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No. 06-1595

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IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE SIXTH CIRCUIT PROPERLY HELD THAT MERE PASSIVE COOPERATION IN AN EMPLOYER-INITIATED INTERNAL EEO INVESTIGATION DOES NOT RISE TO THE LEVEL OF PROTECTED ACTIVITY UNDER TITLE VII'S ANTI-RETALIATION PROVISION	9
A. An Employer-Initiated Internal Investigation Is Not An "Investigation, Proceeding, Or Hearing" Under Title VII's Anti-Retaliation Provision	9
B. The Sixth Circuit Was Correct That Opposition Requires More Than Mere Cooperation In An Employer-Initiated Internal Investigation	16
II. AFFIRMING THE SIXTH CIRCUIT'S DECISION BELOW WOULD SERVE THE PURPOSES OF TITLE VII BY MAINTAINING A FRAMEWORK FOR PROTECTION THAT IS BROAD IN SCOPE WHILE STILL BALANCING IMPORTANT EMPLOYER INTERESTS	20

TABLE OF CONTENTS—Continued

Page

A. The Suggestion That Retaliation Against Witnesses In Employer-Initiated Internal Investigations Would Dramatically Increase Is Greatly Exaggerated And Extending Protection Under Section 704(a) May Serve To Chill Proactive Employer Investigations 20

B. Extending Protection Based On The Facts Of This Case Is Unnecessary Because Broad Protection Already Exists Under Section 704(a) 22

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	7, 21
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	12
Armstrong v. Index Journal Co., 647 F.2d 441 (4th Cir. 1981)	16, 17
Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304 (6th Cir. 1989)	10, 11, 16
Brower v. Runyon, 178 F.3d 1002 (8th Cir. 1999)	10
Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)	*passim*
Burlington Northern & Santa Fe Railway v. White, 548 U.S. 53 (2006)	3, 15
Byers v. Dallas Morning News, Inc., 209 F.3d 419 (5th Cir. 2000)	10
Clover v. Total System Services, Inc., 176 F.3d 1346 (11th Cir. 1999)	17
EEOC v. Total System Services, Inc., 221 F.3d 1171 (11th Cir. 2000)	10, 13, 14
Faragher v. City of Boca Raton, 524 U.S. 775 (1998)	*passim*
Gilooly v. Missouri Department of Health & Senior Services, 421 F.3d 734 (8th Cir. 2005)	9
Glover v. South Carolina Law Enforcement Division, 170 F.3d 411 (4th Cir. 1999)	22
Kotcher v. Rosa & Sullivan Appliance Center, 957 F.2d 59 (2d Cir. 1992)	16
Ledbetter v. Goodyear Tire and Rubber Co., __ U.S. __, 127 S. Ct. 2162 (2007)	3, 11
Moore v. City of Philadelphia, 461 F.3d 331 (3d Cir. 2006)	9, 16

TABLE OF AUTHORITIES—Continued

Page

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) 7, 11
Pastran v. K-Mart Corp., 210 F.3d 1201 (10th Cir. 2000) 16
Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) 3, 19
Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 3
Silver v. KCA, Inc., 586 F.2d 138 (9th Cir. 1978) 11
Trent v. Valley Electric Association, Inc., 41 F.3d 524 (9th Cir. 1994) 16
Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85 (1st Cir. 2006) 16
Vasconcelos v. Meese, 907 F.2d 111 (9th Cir. 1990) 10
Worth v. Tyer, 276 F.3d 249 (7th Cir. 2001). 16

FEDERAL STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*
42 U.S.C. § 2000e-3(a) ..... *passim*
42 U.S.C. § 2000e-5(b) 12
42 U.S.C. § 2000e-5(e)(1) 11
42 U.S.C. § 2000e-5(f)(1) 12

OTHER AUTHORITIES

EEOC Compliance Manual § 2: Threshold Issues, #2-II-A-5 All Statutes: Retaliation 17, 18
EEOC Compliance Manual § 8: Retaliation, #2-B Protected Activity: Opposition 18

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*. The brief supports the position of Respondents before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. As the legal arm of NFIB, the Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a

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fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are all employers or representatives of employers that are subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and other federal and state employment nondiscrimination laws. As potential defendants to claims of discrimination under Title VII, *amici's* members have a direct and ongoing interest in the issue before this Court concerning the extent to which an employee's cooperation in an employer-initiated internal investigation may rise to the level of protected activity under Title VII. The court below correctly held that mere cooperation in an employer-initiated internal investigation, without more, does not constitute protected activity under either Section 704(a)'s "participation" or "opposition" clause.

Because of their interest in the application of the nation's fair employment laws, EEAC and/or NFIB Small Business Legal Center have filed a*micus curiae* briefs in a number of cases before this Court involving the proper interpretation of Title VII.[2] Given their significant experience, *amici* are well-situated to brief this Court on the ramifications of the

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[2] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007) (discussing the appropriate time period for filing a discrimination claim under Title VII); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (interpreting adverse action); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (interpreting adverse action); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (analyzing employer's vicarious liability); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (analyzing employer's vicarious liability); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (interpreting the term "employee" under Title VII).

issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Vicky Crawford (Petitioner) was employed by the Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), most recently as Payroll Coordinator within the school district's business office. Pet. App. 4a, 13a. In the fall of 2001, Metro hired Dr. Gene Hughes as the school district's Employee Relations Director. *Id.* at 4a. Shortly thereafter, Metro learned that some school district employees had raised concerns about alleged inappropriate conduct by Hughes. *Id.* A school district attorney, Jennifer Bozeman, brought the information to the attention of Dr. Pedro Garcia, the Director of Schools. *Id.* An internal investigation ensued, which involved, among other things, interviews of a number of school district employees, including Crawford. *Id.* at 5a. Veronica Frazier, Metro's Assistant Director of Human Resources, led the investigation. *Id.* at 4a-5a.

As part of her investigation, Frazier interviewed Crawford in July, 2002. *Id.* at 5a. In response to Frazier's questions, Crawford recounted inappropriate conduct of a sexual nature that Hughes allegedly had directed towards her. *Id.* Crawford never complained, either prior to or after the July 2002 interview, that Hughes had sexually harassed or otherwise discriminated against her. Pet. App. 16a-17a. A report of the investigation was completed and forwarded to Dr. Garcia in September 2002, which concluded that Hughes had engaged in inappropriate behavior, though not to the extent Crawford had alleged. Cert. Br. Opp. App. 8; Pet. App. 5a.

During the investigation, Frazier was informed of irregularities within the school district's payroll division, including failure to pay employee paycheck garnishments to the courts, failure to make employee annuity payments, and late federal tax filings. Jt. App. 92-93. A separate, independent investigation of these allegations ensued, which ultimately led to the suspension and termination of Crawford's employment on January 6, 2003. *Id.*

On June 24, 2003, Crawford filed an administrative charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that she was fired in retaliation for having participated in Metro's internal sexual harassment investigation. Pet. App. 6a. After receiving a no reasonable cause determination and a Notice of Right to Sue letter from the EEOC, Crawford commenced an action in the United States District Court for the Middle District of Tennessee, alleging that her termination constituted unlawful retaliation in violation of Title VII. *Id.* Metro moved for summary judgment, arguing that Crawford did not engage in protected activity under Title VII and thus could not establish a *prima facie* case of retaliation. *Id.* at 13a.

The district court agreed with Metro and granted its motion for summary judgment. *Id.* at 12a, 17a. The court analyzed Crawford's claim under both the "participation" clause and the "opposition" clause of Section 704(a) of Title VII. Pet. App. 15a-17a. The court held that Section 704(a) does not protect participation in internal employer investigations in the absence of a pending EEOC charge, and there was no pending EEOC charge at the time Frazier interviewed Crawford. *Id.* It also held that Crawford did not engage in opposition conduct merely by respond-

ing to questions during Metro's internal investigation. *Id.* at 16a-17a. The district court thus concluded that Crawford could not establish that she was terminated for engaging in protected activity in violation of Section 704(a). *Id.* at 15a-17a.

Crawford appealed the district court's decision to the Sixth Circuit, which affirmed summary judgment, holding that Crawford's conduct did not amount to either "participation" or "opposition" within the meaning of Section 704(a). Pet. App. 6a-10a. Like the district court, the Sixth Circuit found that Crawford's conduct did not amount to protected activity under the "participation" clause of Section 704(a) because there was no EEOC charge pending at the time Frazier interviewed her. *Id.* at 8a. In doing so, the Sixth Circuit relied on decisions from a number of other federal courts of appeals, all holding that participation in an internal EEO investigation absent a formal EEO charge or civil complaint is insufficient to constitute "participation" under Section 704(a). *Id.*

The Sixth Circuit also rejected Crawford's contention that her involvement in her employer's internal EEO investigation amounted to protected "opposition" conduct under Section 704(a), concluding that Crawford's conduct in cooperating with Metro's internal investigation was not the kind of overt opposition required for protection under Title VII. *Id.* at 7a-8a. It observed, "[t]he general idea is that Title VII demands active, consistent 'Opposing' activities to warrant . . . protection against retaliation." *Id.* at 7a (citation and internal quotations omitted).

Petitioner filed a petition for writ of certiorari, which this Court granted on January 18, 2008.

SUMMARY OF ARGUMENT

The Sixth Circuit properly held that mere passive cooperation in an employer-initiated internal EEO investigation does not rise to the level of protected activity under Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a), which protects only those individuals who "oppose" discriminatory employment practices and those who "participate" in Title VII investigations, proceedings, or hearings.

An employer-initiated internal investigation is not an "investigation, proceeding or hearing" under Section 704(a). Title VII, 42 U.S.C. §§ 2000e *et seq.*, establishes "an integrated, multistep enforcement procedure," *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977), that begins with the filing of a charge of discrimination with the EEOC, continues with an EEOC investigation, and culminates either in the EEOC filing a complaint in federal court or issuing the charging party a Notice of Right to Sue letter. The administrative enforcement procedure established under Title VII simply does not include employer-initiated internal investigations and thus participation in an internal investigation does not constitute participation in a Title VII "proceeding."

The Sixth Circuit also was correct in holding that to be protected under § 704(a), opposition conduct requires an individual do more than merely cooperate in an employer-initiated internal investigation. Title VII calls on employers "to self-examine and to self-evaluate their employment practices . . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citation omitted). Thus, employers are encouraged to be pro-active in handling workplace issues. As this Court has observed, however, employees also bear some

responsibility in effectuating the purposes of Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Extending protection under Section 704(a) to those who do not come forward undermines the principle of "avoidable consequences" and makes it significantly more difficult for employers to engage in proactive prevention. *Id.*

Affirming the Sixth Circuit's decision below would serve the purposes of Title VII by maintaining a framework for protection that is broad in scope while still balancing important employer interests. Section 704(a) already extends protection to those who, in good faith, actively oppose discriminatory employment practices even in the absence of a filed charge. Further expansion thus is unnecessary and may chill proactive corporate investigations by placing employers at risk of having to defend frivolous charges and lawsuits brought by a new class of "anonymous" complainants. Furthermore, there already exists in the *Faragher/Ellerth* affirmative defense a strong incentive for employers not to retaliate against employees. As the court below observed, "[a] policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an instance of an allegedly unjustified firing would put the *Faragher* defense at risk." Pet. App. 9a-10a. The decision below thus properly maintains the balance contemplated by Title VII between protecting access to Title VII's enforcement scheme and employers' interests in conducting proactive investigations without the fear of unfounded retaliation charges and lawsuits.

ARGUMENT

I. THE SIXTH CIRCUIT PROPERLY HELD THAT MERE PASSIVE COOPERATION IN AN EMPLOYER-INITIATED INTERNAL EEO INVESTIGATION DOES NOT RISE TO THE LEVEL OF PROTECTED ACTIVITY UNDER TITLE VII'S ANTI-RETALIATION PROVISION

A. An Employer-Initiated Internal Investigation Is Not An "Investigation, Proceeding, Or Hearing" Under Title VII's Anti-Retaliation Provision

Section 704(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a). Section 704(a) thus protects those who "oppose" discriminatory employment practices, as well as those who "participate" in Title VII investigations, proceedings, or hearings. *See Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). "The two clauses of this section typically are described, respectively, as the opposition clause and the participation clause." *Gilooly v. Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 741 (8th Cir. 2005) (Colloton, J., concurring in part, dissenting in part).

Several federal courts of appeals have had the opportunity to address whether or not informal employee complaints or participation in an employer-initiated internal investigation constitute protected activity under the participation clause of Section 704(a). In addressing this issue, these courts consistently have held that mere cooperation in an employer's internal investigation, absent a pending EEOC charge, is *not* protected "participation" conduct.[3] *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (the "clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC"); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) ("In the instant case, the 'participation clause' is irrelevant because Byers's [SIC] did not file a charge with the EEOC until *after* the alleged retaliatory discharge took place"); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999) (participation includes "[a]t a minimum . . . the beginning of a proceeding or investigation under Title VII"); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) ("Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser's peril") (footnote omitted); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989) ("since there is no evidence that [Title VII] proceedings were instigated prior to Booker's letter, he cannot seek protection under the participation

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[3] While acknowledging that the Sixth Circuit's decision "comports with decisions of other circuits to have considered the issue," the United States in its *amicus* brief dismisses this fact by suggesting the weight of authority simply is incorrect. Brief for United States as *Amicus Curiae* 24.

clause"); *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) (finding that an EEOC charge must be filed prior to alleged retaliatory conduct to establish plaintiff engaged in protected activity).

Requiring that an EEOC charge be pending in order for conduct to be protected under Section 704(a)'s participation clause comports with the underlying purpose of Title VII as a whole. "The purpose of the statute is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged." *Brown & Williamson Tobacco Co.*, 879 F.2d at 1313. As this Court has observed,

> In the Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice.

Occidental Life, 432 U.S. at 359 (footnote omitted).

Thus, the "machinery" protected under Title VII is the "multistep enforcement procedure" established by Title VII, and, as defined, does not include—and cannot be triggered by—employer-initiated internal investigations conducted in the absence of an EEOC charge. The statute requires that an individual file a charge of discrimination with the EEOC within 180 or 300 days of the alleged discriminatory act in order to begin the administrative enforcement process. 42 U.S.C. § 2000e-5(e)(1); *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, __ U.S. __, 127 S. Ct. 2162, 2165 (2007). The EEOC then must notify the employer identified in the charge of the allegations within ten

days of the filing of the charge, and thereafter "shall make an investigation thereof" to determine if there exists reasonable cause to believe the charge is true. 42 U.S.C. § 2000e-5(b). If the EEOC determines that there is reasonable cause to believe the charge is true, it must attempt to eliminate the alleged discriminatory practice through "conference, conciliation, and persuasion." *Id.* Only after the EEOC has dismissed a charge or has issued a Notice of Right to Sue to the charging party may he or she file an action in federal court. 42 U.S.C. § 2000e-5(f)(1).

An employer-initiated internal investigation thus plainly is not a Title VII "proceeding, investigation or hearing" as contemplated by the Act. Filing an internal EEO complaint does not toll the timeframe within which a Title VII charge must be filed, nor is participation in an internal EEO investigation sufficient to satisfy a plaintiff's duty to exhaust administrative remedies.[4] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the [EEOC], and (2) received and acted upon the [EEOC]'s statutory notice of the right to sue") (citation omitted). Furthermore, Title VII's administrative enforcement mechanism does not require employer-initiated internal investigations under any

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[4] In this regard, the United States' arguments that an employer's internal investigation should be elevated to the status of an EEOC charge for the purposes of Section 704(a) is disingenuous.

circumstances; in fact, nowhere in Title VII are internal investigations even mentioned.

In contrast to an EEOC investigation, employer-initiated internal investigations generally proceed pursuant to corporate policy and can encompass issues that are well beyond the scope of Title VII—actions, for instance, that may be legal under Title VII, but which nevertheless may violate an employer's internal workplace conduct policy. During an internal investigation process, "the employer is not acting pursuant to the statute or under color of law, but is conducting the company's own business." *Total Sys. Servs., Inc.*, 221 F.3d at 1176. To equate an internal employer investigation with an EEOC investigation under the participation clause would be inconsistent with Title VII's well-established administrative enforcement scheme.

Employers should be free to proactively investigate claims of harassment without the fear that any employee who cooperates in the investigation later could file a charge for retaliation if they suffer disciplinary action, either as a result of the investigation or for some other reason close in time to the investigation. Expanding protection under the participation clause to include internal employer investigations would place an unfair burden on employer-initiated internal investigations by exposing employers to a potential flood of frivolous retaliation charges and lawsuits, which in turn could dissuade employers from proactively investigating inappropriate workplace conduct. By limiting coverage to post-charge activity, "the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation." Pet. App. 10a.

Relying on this Court's decisions in *Faragher* and *Ellerth*, Petitioner and her *amici* attempt to equate a corporate investigation conducted pursuant to corporate policy with a government-conducted EEOC investigation conducted pursuant to Title VII in order to make it "fit" within Section 704(a)'s participation clause. They suggest that the affirmative defense to liability established by this Court in those cases essentially obligates an employer to institute anti-harassment policies and procedures, and, in turn requires employees to affirmatively report incidents of alleged harassment to their employer as a prerequisite to filing an EEOC charge. Pet. Br. 27-29. Petitioner argues that an employer's internal proceeding therefore is an integral part of the Title VII framework and must be considered an investigation or proceeding under Title VII. *Id.*

Contrary to Petitioner's arguments, however, *Faragher* and *Ellerth* do not by their own accord *require* employers to develop formal anti-harassment policies or to establish specific internal complaint procedures. The decisions simply afford employers the opportunity to avoid liability resulting from unlawful harassment perpetrated by their supervisors. *See Total Sys. Servs., Inc.*, 211 F.3d at 1174 n.3.

In fact, extending protection under the participation clause to individuals who passively cooperate in internal investigations could very well undermine the *Faragher/Ellerth* affirmative defense. In this case, for instance, Petitioner, a 30-year employee presumably familiar with Metro's EEO policies and procedures, could have at any time filed a formal complaint alleging sexual harassment. She chose not to do so. If Petitioner had filed a suit for sexual harassment (as opposed to retaliation) under these

circumstances, Respondent would have been able to successfully assert the *Faragher/Ellerth* affirmative defense because it had a comprehensive anti-harassment policy in place and had instituted procedures for employees to report harassing conduct, procedures which Petitioner "unreasonably" failed to take advantage of prior to filing suit.

Allowing Petitioner to file a claim for retaliation under the participation clause permits her to bypass—for no good reason—the corrective opportunities provided for by the Respondent, thus rendering the second prong of the *Faragher/Ellerth* affirmative defense moot. While Petitioner may not have been able to directly recover for sexual harassment, under the expanded theory she endorses, she nevertheless would be able to state a viable claim for retaliation.

The Petitioner and her a*mici* would like this Court to believe that context is irrelevant when determining whether an employee has engaged in protected activity under Title VII, but context often matters in making such determinations. As this Court has observed, "[t]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 69 (2006). They argue that the mere act of conveying information about a potentially harassing incident, no matter where, when, or how it is done, should always be protected under the participation clause of Section 704(a). But the plain text of the law compels a different conclusion.

B. The Sixth Circuit Was Correct That Opposition Requires More Than Mere Cooperation In An Employer-Initiated Internal Investigation

The Sixth Circuit's conclusion that Petitioner's actions did not rise to the level of opposition under Title VII comports with other cases addressing the issue. Courts generally have only extended protection under the opposition clause to individuals who have actively or overtly opposed what they reasonably believed to be discriminatory conduct. *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 96-97 (1st Cir. 2006) (complaint to supervisor and EEO officer); *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d Cir. 2006) (complaints to supervisors and those up the chain-of-command); *Worth v. Tyer*, 276 F.3d 249, 265 (7th Cir. 2001) (report to local police regarding assault); *Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1203, 1205 (10th Cir. 2000) (complaint to human resources manager and district manager); *Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 525 (9th Cir. 1994) (complaint to office manager and later a written complaint); *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 65 (2d Cir. 1992) (internal complaint to company management protesting supervisor's sexually harassing conduct); *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (complaints to supervisors regarding unequal pay); *but see Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989) (holding that one letter to the human resources department was *not* opposition conduct).

In order to be considered protected activity under Section 704(a), opposition conduct must involve some affirmative or overt act. For example, in *Index*

Journal Co., 647 F.2d at 448, the Fourth Circuit held that several verbal complaints the plaintiff made to her supervisor about her rate of pay, coupled with the fact that higher-level managers also knew about the complaints, constituted protected opposition conduct. While the complaints were verbal and informal, it was clear to the court that the plaintiff was affirmatively opposing conduct she reasonably believed to be discriminatory. *Id.*

Neither Petitioner nor her *amici* can point to any cases that support the claim that Section 704(a) does not require "active" opposition. Whether conduct is protected under the opposition clause is a factual inquiry that should be made on a case-by-case basis. There is no disagreement that some active and opposing conduct, including, for example, verbal or written internal complaints to supervisors or managers, threats to file an EEO claim, picketing discriminatory conduct, or even disobeying an order that an employee believes to be discriminatory, might constitute protected activity under Section 704(a), depending on the circumstances. Petitioner engaged in no such conduct, however.

While the EEOC in written enforcement guidance[5] has taken the position that testifying or presenting evidence in an employer's internal EEO investigation always is protected under the opposition clause, at least one federal appellate court has rejected the agency's interpretation. *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346 (11th Cir. 1999).[6] The EEOC

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[5] EEOC Compl. Man. § 2: Threshold Issues, #2-II-A-5 All Statutes: Retaliation, *available at* http://www.eeoc.gov/policy/docs/threshold.html#2-II-A-5

[6] Even the agency's guidance on retaliation, a separate document from the "threshold issues" guidance, *supra* note 5, uses

explains that Title VII encourages employers to undertake proactive investigations and, therefore, when an employer investigates allegations of discrimination, an employee's cooperation in that investigation, by definition, is opposition to the conduct that is being investigated.[7] But this reasoning draws no line between employees who simply provide information during an internal investigation and those who legitimately oppose the conduct at issue. It also fails to account for investigations of corporate misconduct rather than potential violations of Title VII. While the EEOC's policy guidance suggests that anyone who gives information during an internal EEO investigation should be found to have engaged in opposition conduct, even if some employees never intend to oppose the conduct, this cannot be what Congress intended.

Protecting every participant in an internal investigation, whether they intend to oppose discriminatory conduct or not, would lead to a significant increase in claims of retaliation, as employees facing any type of discipline or punishment could use their cooperation in an internal investigation as a shield to any subsequent personnel issues. Extending protection as Petitioner urges also would create a

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conduct that can only be described as overt and active conduct to describe what may constitute opposition: "Complaining to anyone about the alleged discrimination against oneself or others;" threatening to file a charge of discrimination; picketing in opposition to discrimination; or refusing to obey an order reasonably believed to be discriminatory. *See* EEOC Compl. Man. § 8: Retaliation, #2-B Protected Activity: Opposition, *available at* http://www.eeoc.gov/policy/docs/retal.html#IIpartB

[7] *See* EEOC Compl. Man. § 2: Threshold Issues, #2-II-A-5 All Statutes: Retaliation n.41, *available at* http://www.eeoc.gov/policy/docs/threshold.html#N_41

new class of plaintiffs—the "anonymous objector"—which essentially would require employers to become "mind readers" in order to determine who is opposing allegedly discriminatory conduct and who is not.

Internal investigations generally are conducted as confidentially as possible. Under the rule advanced by Petitioner, an employee who simply cooperates in an internal investigation and later suffers some adverse employment action could claim protected status, even though he or she never took affirmative action to voice any opposition, and regardless of whether the ultimate decision-maker had any knowledge whatsoever of the alleged protected activity. The time and expense associated with litigating an "anonymous objector" retaliation case would place unnecessary and unmanageable burdens on employers and would do nothing to advance Title VII's purposes and objectives.

Title VII certainly encourages employers to investigate allegations of workplace misconduct and to correct conduct that, if left unresolved, could lead to unlawful discriminatory employment practices. As this Court has observed, however, employees also bear some responsibility to effectuate the purposes of Title VII. *Ellerth*, 524 U.S. at 764. Title VII "borrows from tort law the avoidable consequences doctrine under which victims have a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146 (2004) (citations and internal quotations omitted). Indeed, an employer may never identify potentially discriminatory conduct if employees do not report the conduct. Protecting those who do not come forward and take

advantage of the means available to oppose what they reasonably believe to be inappropriate conduct undermines the principle of avoidable consequences and makes it significantly more difficult for employers to engage in proactive prevention.

In addition, an employer will have little incentive to conduct proactive investigations if it has to worry that any employee who simply cooperates in such an investigation might later sue for retaliation. Practically speaking, even if an employer could successfully articulate a legitimate, nondiscriminatory reason for the employee's termination, defending such a retaliation charge would no doubt be time consuming and costly. Employers should not have to bear this burden in cases where an employee did nothing affirmative to voice his or her opposition to conduct believed to constitute a violation of Title VII.

II. AFFIRMING THE SIXTH CIRCUIT'S DECISION BELOW WOULD SERVE THE PURPOSES OF TITLE VII BY MAINTAINING A FRAMEWORK FOR PROTECTION THAT IS BROAD IN SCOPE WHILE STILL BALANCING IMPORTANT EMPLOYER INTERESTS

A. The Suggestion That Retaliation Against Witnesses In Employer-Initiated Internal Investigations Would Dramatically Increase Is Greatly Exaggerated And Extending Protection Under Section 704(a) May Serve To Chill Proactive Employer Investigations

Petitioner and her *amici* paint an unrealistic picture in which every complaining employee and

every witness cooperating in an employer's internal investigation is terminated on the spot without Section 704(a) protection. But this "sky is falling" scenario has not become a reality, even against the backdrop of decisions that consistently have refused to extend Section 704(a)'s scope to the point urged by them.

This Court described the primary objective of Title VII as encouraging employers "to self-examine and to self-evaluate their employment practices . . . ." *Albemarle Paper Co.*, 422 U.S. at 418 (citation omitted). In *Faragher* and *Ellerth*, this Court reinforced this concept by providing for an affirmative defense that encourages employers to develop, and individuals to use, effective complaint procedures. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 806-08. Employers long ago recognized that workplace discrimination not only is against the law, but also is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company. Most employers are interested in promoting a harmonious workplace, including instituting comprehensive policies prohibiting workplace harassment and retaliation that often goes beyond what is required by Title VII.[8]

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[8] The Petitioner and her *amici* cite EEAC briefs out of context in arguing for an expansion of § 704(a). *Amici's* position is and has always been that employees should feel free to report potentially discriminatory conduct to their employers without the fear of retaliation and that employers should do everything they can to make employees feel comfortable doing so. The point made here is that it is unreasonable to hold employers accountable for retaliation based on actions that are not protected under the text of the statute and of which they would have no notice.

In determining what conduct should be protected under the opposition clause, however, courts should "balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 413 (4th Cir. 1999) (citation omitted).

Subjecting employers to the predictable flood of frivolous retaliation charges and lawsuits that would result from an expansion of Section 704(a) would frustrate their efforts to proactively address workplace issues and would impose an unmanageable burden on both the EEOC and the courts.

B. Extending Protection Based On The Facts Of This Case Is Unnecessary Because Broad Protection Already Exists Under Section 704(a)

There already exists under Section 704(a) broad protection for those employees who choose to act against what they perceive to be unlawful discrimination. Anyone who files a charge of discrimination with the EEOC is protected under the participation clause, and anyone who actively opposes conduct he or she reasonably believes to be discriminatory is protected under the opposition clause. There simply is no sound basis for judicially expanding Section 704(a) any further.

The prospect that any employee cooperating in an employer-initiated internal investigation may file a claim for retaliation under Section 704(a) presents employers with a difficult choice. Generally it is in an employer's best interest to proactively investigate

rumors of inappropriate workplace conduct. But when faced with the fact that being proactive might lead to potential litigation for retaliation, some employers will decide not to take that risk when seemingly minor workplace issues arise. Employers should not be forced to make this choice.

Petitioner argues that employers need some incentive in order not to retaliate against employees who cooperate in internal investigations, but there already is a strong incentive preventing employers from retaliating against employees in these circumstances. First, responsible employers are not looking for the opportunity to retaliate against their employees. But even in situations in which there may be the threat or opportunity for retaliation, the availability of the *Faragher/Ellerth* affirmative defense provides a strong incentive against retaliating. As the court below observed, "[a] policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an instance of an allegedly unjustified firing would put the *Faragher* defense at risk." Pet. App. 9a-10a. This alone acts as a strong deterrent to indiscriminately terminating any employee who cooperates in an internal investigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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